

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DELBERT EBNER)	
Claimant)	
VS.)	
)	
KANSAS STRUCTURAL COMPOSITES INC.)	Docket No. 253,486
Respondent)	
AND)	
)	
CALIFORNIA INDEMNITY INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals from a preliminary hearing Order entered by Administrative Law Judge Steven J. Howard on September 6, 2000.

ISSUES

The first preliminary hearing order was entered in this case on August 9, 2000, as the result of an August 8, 2000, preliminary hearing. The August 9, 2000, preliminary hearing Order granted claimant's request for medical treatment and ordered respondent to pay \$500 in unauthorized medical expenses.

At the August 8, 2000, preliminary hearing, respondent notified the ALJ that additional evidence would be presented by the respondent through the deposition testimony of respondent's manager, Mr. Stephen Gill, scheduled for August 15, 2000. The ALJ, however, noted he was required to enter a preliminary hearing order within five days from the date of the preliminary hearing. Thus, the ALJ notified the parties he would enter an order based on the preliminary hearing record established as of August 8, 2000. If respondent had additional deposition testimony evidence to offer at a later date, in order to have the deposition considered, the ALJ would retain continuing jurisdiction over the matter. Thus, the respondent would not have to file a separate application.

At the respondent's request, a second preliminary hearing was held on August 29, 2000. At that hearing, the ALJ admitted the respondent's evidentiary deposition of Mr. Gill taken on August 15, 2000. Thereafter, the ALJ entered the September 6, 2000, preliminary hearing Order that is the subject of this appeal. That preliminary hearing Order denied respondent's request to modify the original August 9, 2000, preliminary hearing Order that had granted claimant's request for preliminary hearing benefits.

On appeal, the respondent requests the Appeals Board to review the ALJ's preliminary hearing Order and find claimant failed to prove he suffered an accidental injury that arose out of and in the course of his employment. Additionally, respondent argues claimant failed to prove he provided respondent with timely notice of the accidental injury.

In contrast, claimant requests the Appeals Board to affirm the ALJ's preliminary hearing Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties' briefs, the Appeals Board finds the ALJ's preliminary hearing Order should be affirmed.

On November 2, 1999, claimant was working as a technician for respondent in Pittsburg, Kansas. On that date, claimant testified he injured his back while unloading a heavy 55-gallon drum of steel bridge anchors. Claimant also testified he notified his foreman and respondent's manager, Mr. Gill, who was also working for the respondent in Pittsburg, Kansas, of the accident. At the time claimant notified Mr. Gill of the accident, claimant testified that Mr. Gill's reply was "there's no way it happened on the job."

The respondent's bridge job in Pittsburg, Kansas, was completed approximately one week after the date of claimant's alleged accident. Claimant returned to work at respondent's home office located in Russell, Kansas. Claimant then sought medical treatment for his back injury on December 1, 1999, with Eugene M. Davidson, D.C., who had also treated claimant in the past. Dr. Davidson's records were admitted into the preliminary hearing record. He treated claimant with adjustments on three occasions and then referred claimant to orthopedic surgeon Gregory A. Woods, M.D., in Hays, Kansas.

Billing statements for Dr. Woods, a local pharmacy, and Russell Regional Hospital were admitted into the preliminary hearing record. Those records indicate that Dr. Woods saw claimant on four occasions with March 16, 2000, the last visit. Those records also indicate that Dr. Woods prescribed medication and physical therapy to treat claimant's back injury. The statement from Russell Regional Hospital indicates that claimant participated in a physical therapy program from January 2000 through February 16, 2000.

At the August 8, 2000, preliminary hearing, claimant testified he remained symptomatic and was not working.

Respondent's manager and claimant's foreman, Mr. Gill, testified by deposition on August 15, 2000. His deposition testimony was admitted into evidence at the August 29, 2000, preliminary hearing. Mr. Gill's testimony is basically in direct conflict with claimant's testimony.

Although Mr. Gill acknowledges that claimant unloaded a 55-gallon drum of steel bridge anchors from a truck while working in Pittsburg, Kansas, Mr. Gill denies that claimant told him he injured his back while unloading the drum. Instead, Mr. Gill claims one night while they were working in Pittsburg, Kansas, claimant notified Mr. Gill that he had injured his back but the injury

occurred when claimant fell in the bathtub at the motel. Mr. Gill also testified that after the claimant notified him of the fall in the bathtub, he was aware that claimant was having back problems working. But Mr. Gill denies that claimant requested the respondent to provide him medical treatment for such back problems. Mr. Gill testified that within one week, after returning to Russell, Kansas, from Pittsburg, Kansas, claimant terminated his employment with respondent. At the time claimant terminated, he did not give Mr. Gill any reason for the termination.

Mr. Gill testified he did not know the claimant was making a claim against respondent for a back injury that occurred while claimant was working for respondent until approximately two to four months after claimant terminated.

Claimant claims he suffered a low back injury while he was working for the respondent in Pittsburg, Kansas, on November 2, 1999. Respondent, however, presents conflicting evidence through the testimony of its manager and claimant's foreman, Mr. Gill, that claimant told him he injured his low back not while performing his regular work duties but when he fell in a bathtub at a motel in Pittsburg, Kansas.

The ALJ did not give any reasons either in the preliminary hearing Order or in the preliminary hearing transcript for granting claimant preliminary hearing benefits. The Appeals Board finds the ALJ, in granting claimant preliminary hearing benefits, had to conclude that claimant's testimony was truthful. The ALJ had the opportunity to evaluate claimant's credibility as claimant testified in person at the preliminary hearing. In circumstances such as this, where conflicting evidence provides more than one possible answer, the Appeals Board finds it appropriate to give some deference to the ALJ's conclusions. Therefore, at this point in the proceedings and giving some deference to the ALJ's conclusions, the Appeals Board finds claimant proved he suffered an accidental injury while working for the respondent, and he provided respondent with timely notice of the accident.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Steven J. Howard on September 6, 2000, should be, and the same is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

c: Michael R. Wallace, Shawnee Mission, KS
Donald J. Fritschie, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director